Supreme Court, U.S.
FILED

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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

SYLVESTER CLAY,
Petitioner

VS.

THE UNITED STATES OF AMERICA
Respondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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27 pp

QUESTION PRESENTED

I. Whether the resolution of a question of fact, in sentencing a defendant, and in the application of the United States Sentencing Guidelines can be reviewed for plain error.

II. Whether the Fifth Circuit Court of Appeals in finding that a co-conspirator's sole possession of a firearm was a foreseeable act of a conspiracy sufficient to convict Petitioner of the substantive offense of knowingly using and carrying a firearm during a drug trafficking offense:

a) Lessened the Government's burden of proof; and

b) Denied Petitioner

due process of law.

LIST OF PARTIES IN APPELLATE COURT

Sylvester Clay,

Appellant,

United States of America,

Appellee

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REFERENCE TO OPINIONS OF LOWER COURT

The opinion of the Fifth Circuit Court of Appeals is reproduced in the appendix.

JURISDICTION

The Court of Appeals had appellate jurisdiction over the district court's final judgment in this criminal case, pursuant to 18 U.S.C. § 3742 and 28 U.S.C. § 1291. The panel's order was entered on February 17, 1994. See A-3. Consistent with this Honorable Court's Rule 13, this Petition is timely filed. This Court's jurisdiction in the instant case is based on 28 U.S.C. § 1254(1), and United States Supreme Court Rule 10.

CONSTITUTIONAL PROVISIONS AT ISSUE

The Due Process Clause of the Fifth Amendment to the United States Constitution states:

> "[N]or shall any person be deprived of . . . liberty . . . without due process of law."

STATUTORY PROVISION AT ISSUE

The Federal Rules of Criminal Procedure, Rule 52(b) (Plain Error) provides:

> "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

STATEMENT OF THE CASE

The jurisdiction of the district court was invoked pursuant to the indictment filed in the United States District Court for the Eastern District of Louisiana, New Orleans Division. References herein shall be made to the trial record by the designation "R".

The Petitioner was indicted by a federal grand jury charging him with conspiracy to distribute in excess of ten kilograms of cocaine, distribution of approximately 996.2 grams of cocaine, and possession of a firearm during and in relation to a drug trafficking crime. The Petitioner entered a plea of not guilty to all three counts, and proceeded to trail before a jury on October 13, 1992.

On September 20, 1989, a search warranted was executed by agents of the Drug Enforcement Administration on two

apartments on Audubon Street, New Orleans, Louisiana. Approximately 13.1 kilograms of cocaine was seized from the Audubon Street premises. The owner of the seized cocaine was Jaime Cifuentes. (4 R.22).

At trial, Cifuentes testified that he met the Petitioner, Sylvester Clay, around March 1988 when he began to supply Clay with an average of 30 to 40 kilograms of cocaine per month. Cifuentes continued to serve as a supplier for Clay until execution of the warrant. (4 R.100).

Two other conspirators, Michael Shorts and Pierre Parsee, testified regarding the structure of Clay's drug organization. Michael Shorts testified that he worked for Clay as a drug dealer from March 1989 until his arrest in 1991. He stated that he would contact Clay to arrange pricing for the cocaine and then contact Pierre Parsee, Clay's right-hand

man, to arrange delivery of the drugs.

Pierre Parsee testified that from 1988 through October or November 1989, he bought cocaine from Clay. After that time, he became Clay's right-hand man and began accepting and delivering cocaine for his boss. Parsee further testified that on June 5, 1991, he was contacted by Johnell Jones regarding one kilogram of cocaine which was ultimately delivered by Lawson Parker per Clay's authorization. Parker was arrested on June 5, 1991, and a search of Parker's vehicle disclosed 996.2 grams of cocaine and a .44 caliber six-shot revolver. (5 R.192-200).

Clay was convicted by a jury for conspiracy to distribute cocaine, distribution of cocaine, and possession of a firearm during a drug trafficking crime. Clay was sentenced to 262 months of imprisonment on each of the drug counts,

and further sentenced to a 60-month term of imprisonment on the gun count, to be served consecutively to the other terms. Clay challenged his conviction and sentence, contending that: (a) the evidence was insufficient to support any of the three counts of conviction; (b) the district court erred in admitting extrinsic evidence regarding the use of weapons; and (c) the district court committed plain error in determining his base offense level. The Fifth Circuit Court of Appeals affirmed both the conviction and sentence.

ARGUMENT

I.

THE FIFTH CIRCUIT'S FAILURE TO REVIEW AN APPLICATION OF THE UNITED STATES SENTENCING GUIDELINES FOR PLAIN ERROR WAS ERRONEOUS

In reviewing the propriety of the district court's sentencing of Petitioner, the Fifth Circuit noted that since no objection was lodged, the findings of the district court in it application of the sentencing guidelines would be reviewed for plain error. However, the Fifth Circuit held that a question of fact capable of resolution by the district court at sentencing can never constitute plain error. This holding is in conflict with other Federal Circuit Courts of Appeals since application of the United States Sentencing Guidelines can be reviewed for plain error. See U.S. Supreme Court Rule 10.1(a).

On appeal, Petitioner complained that the district court determined the base offense level for sentencing by improperly applying the relevant conduct provision of § 1B1.3 U.S.S.G. At sentencing, no objection was lodged as to the application of § 1B1.3 in determining the relevant conduct of Petitioner. Generally, issues not raised in the trial court, including sentencing issues, will be deemed waived on appeal in the absence of "[P]lain errors or defects affecting substantial rights." Fed. R. Crim. P. 52(b). See United States v. Keppler, 2 F.3d 21 (2nd Cir. 1993). As a result of the misapplication of the guidelines, Petitioner's substantial rights were affected by the increased guideline range used to determine his sentence.

Several other Circuit Courts of Appeals have reviewed for plain error the

application of the sentencing guidelines. The Fifth Circuit restricted its view in the instant case by disregarding the fact that the factual finding complained of was to be considered in the context of a sentence rendered pursuant to the dictates of the sentencing guidelines.

In United States v. Keppler, supra, the Second Circuit applied the standard of plain error in reviewing the application of § 3E1.1(a) in determining whether the defendant had accepted responsibility. The plain error standard of review was utilized despite the resolution of factual issues in evaluating acceptance of responsibility.

Inherent in the application of each provision of the sentencing guidelines is the resolution of numerous questions of fact. The Fifth Circuit failed to consider, that before a factual finding

concerning the quantity of drugs can be made, the propriety in considering § 1B1.3 (Relevant Conduct) must be addressed. This is a question of law which is subject to review for plain error.

In applying § 1B1.3 U.S.S.G., in determining the quantity of drugs attributable to a defendant, the sentencing court must first determine what was reasonably foreseeable to a defendant by making a foreseeability finding. In United States v. Montanye, 996 F.2d 190 (8th Cir. 1993), a conspiracy defendant failed to object disputing the factual issue of foreseeability. Nevertheless, the Eighth Circuit reviewed the actions of the sentencing court under the standard of plain error. Id. at 193.

Basing a sentence on the wrong guideline range constitutes a fundamental error affecting substantial rights within

the meaning of Rule 52(b). United States v. Smith, 919 F.2d 123 (10th Cir. 1990). In Smith, the Tenth Circuit reviewed the sentence for plain error after the defendant first complained on appeal of the applicable guideline range. In the case at issue, Petitioner complained that the guideline range controlling his sentence was determined only after a misapplication of the sentencing guidelines. Accordingly, the Fifth Circuit should have reviewed Petitioner's sentence for plain error.

Therefore, this Honorable Court needs to lend guidance as to the applicability of the "plain error" standard of review in the context of the United States Sentencing Guidelines, specifically in utilizing the "relevant conduct" provisions contained in § 1B1.3. For that reason a compelling basis exists for this

Court to grant the instant Petition for Writ of Certiorari.

II.

THE ACTUAL OR CONSTRUCTIVE POSSESSION OF A FIREARM IS IMPERATIVE TO SUSTAIN A CONVICTION UNDER 18 U.S.C. § 924(a)(1)

It is a violation of federal law to knowingly use and carry a firearm during and in relation to a drug trafficking crime. See 18 U.S.C. § 924(c)(1). The conviction of Petitioner for this offense was solely based upon the possession of a firearm by an alleged co-conspirator. The firearm was not only found in the co-conspirator's car, but was registered in the name of the co-conspirator's sister. Absolutely no evidence was introduced to show that Petitioner had any ownership interest in the firearm, or was an actual or constructive possessor of the seized firearm.

The Fifth Circuit erroneously held that despite Petitioner being personally indicted for using and carrying a firearm, the Government met its burden of proof without establishing either his actual or constructive possession. The Fifth Circuit has interpreted § 924(c)(1) in a manner that conflicts with other Circuit Courts of Appeal, and in a manner that denied Petitioner due process of law. See U.S. Supreme Court Rule 10.1(a).

The Second Circuit Court of Appeals has found, according to the legislative history of Section 924(c)(1), that the term "carry" should not be construed as having any meaning beyond its literal meaning. Therefore, a person cannot be said to "carry" a firearm without at least a showing that the gun is within reach during the commission of the drug offense. United States v. Feliz-Cordero, 859 F.2d

250 (2nd Cir. 1988). In Feliz-Cordero, the Court's review of the evidence turned on whether the firearm's presence was either possessed by or in close proximity to the person charged. The Fifth Circuit upheld Petitioner's conviction despite no such showing.

Petitioner was neither charged with conspiracy to possess a firearm or with aiding and abetting the possession of a firearm. The Fifth Circuit's reliance on Pinkerton v. United States, 328 U.S. 640 (1946), by citing United States v. Maceo, 947 F.2d 1191 (5th Cir. 1991), is misplaced. Petitioner was convicted for conspiracy to distribute cocaine. Thus, Petitioner was liable for the foreseeable substantive acts of distributing cocaine, which was the very essence of the conspiracy.

Finally, sufficiency of evidence to

sustain a conviction under 18 U.S.C. § 924(c)(1 cannot be confused with the application of §§ 2D1.1(b)(1) and 1B1.3(a)(1) U.S.S.G., which enhances a sentence for a defendant's possession of a firearm. Since there was no evidence that Petitioner actually possessed a firearm, or had access to one on June 5, 1991, as charged in Count 3 of the indictment, the appropriate method of treating the possession of a firearm by a co-defendant is at sentencing through application of the guidelines.

It is appropriate to enhance a sentenced under the guidelines for possession of a firearm when a unindicted co-conspirator possesses a weapon but the evidence fails to establish that the weapon was possessed by the defendant. See United States v. Johnson, 997 F.2d 248 (7th Cir. 1993). In Johnson, and in

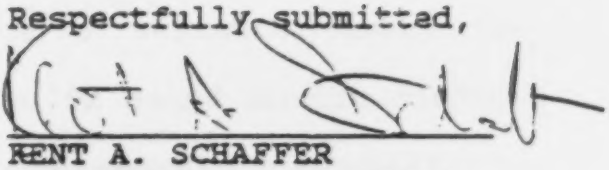
United States v. Nino, 967 F.2d 1508 (11th Cir. 1992), the Seventh and Eleventh Circuit Court of Appeals reasoned that the rules of co-conspirator liability as explained in Pinkerton v. United States, supra, are applicable in determining whether possession of a firearm by a co-conspirator and not the defendant, can be used to enhance a sentence under the guidelines. This is based on the conduct of another being reasonably foreseeable to the defendant. The Fifth Circuit's use of the reasonable foreseeability standard via Pinkerton is improper in reviewing the sufficiency of the evidence for Petitioner's conviction for the substantive charge of possession of a firearm during a drug trafficking crime. As has been shown, the Fifth Circuit Court of Appeals has rendered a decision that effectively lessened the Government's

burden of proof and denied Petitioner due process of law. Therefore, a compelling basis exists for this Honorable Court to grant the instant Petition for Writ of Certiorari.

CONCLUSION

For all of the foregoing reasons, the Petitioner respectfully submits that this Honorable Court should grant this Petition for Writ of Certiorari, reverse the judgment of the Fifth Circuit Court of Appeals, and remand the case for a new trial and/or re-sentencing.

Respectfully submitted,



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